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IN THE

SUPREME COURT OF THE UNITED STATES

No. 1390

JOHN PAUL JONES and RUTH J. RUBEL JONES,
Petitioners,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITIONERS' REPLY BRIEF

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Petitioners respectfully submit the following reply brief.

On page 3 of the Government's Memorandum in Opposition it is stated:

> "The only question tendered here that was raised below is (Pet. 27-29) whether the trial court erred in declining to instruct the jury on the possibility that Continental's payments were for good will."

That statement shows a complete misunderstanding of Petitioners' position in this proceedings. The basic and major premise of this Petition is conflict of opinion between the opinion and judgment of the Tenth Circuit Court of

Appeals herein and other Circuit Courts of Appeal on the several issues presented. Under each heading we have cited cases from other Circuits which we claim to be in conflict with the opinion herein. Conflict of opinions within the Circuits is a productive source of litigation before this Court.

In the case of *Charles Dowd Box Company* v. *Courtney*, 82 S. Ct. 519, the Court said (l.c. 526):

> "[6] It is implicit in the choice Congress made that 'diversities and conflicts' may occur, no less among the courts of the eleven federal circuits, than among the courts of the several States, as there evolves in this field of labor management relations that body of federal common law of which Lincoln Mills spoke. But this not necessarily unhealthy prospect is no more than the usual consequence of the historic acceptance of concurrent state and federal jurisdiction over cases arising under federal law. To resolve and accommodate such diversities and conflicts is one of the traditional functions of this court."

In the case of *United States* v. *Zacks*, 375 U.S. 59, 61, 84 S. Ct. 178, the Court said (l.c. 179):

> "[2] Because of the recurring importance of the problem in the administration of the tax laws and a conflict between the decision below and those of some of the Courts of Appeals, we granted certiorari. 371 U.S. 961, 83 S. Ct. 543, 9 L. Ed. 2d 509."

In the case of *C. I. R.* v. *Hansen*, 360 U.S. 446, 450, 79 S. Ct. 1270, the Court said (l.c. 1273):

> "Because of an asserted conflict between those circuits in these cases, and between other circuits on the question involved, and because of the importance of the question to the proper administration of the revenue laws, we granted certiorari in all three cases."

In the case of *United States* v. *Cannelton Sewer Pipe Company*, 364 U.S. 76, 78, 80 S. Ct. 1581, the Court said (l.c. 1582):

> "In view of the importance of the question to taxpayers as well as to the Government, we granted certiorari. 361 U.S. 923, 80 S. Ct. 294, 4 L. Ed. 2d 239."

In the case of *Knetsch* v. *United States*, 364 U.S. 361, 362, 81 S. Ct. 132, the Court said (l.c. 133):

> "Because of a suggested conflict with the decision of the Court of Appeals for the Fifth Circuit in United States v. Bond, 258 F.2d 577, we granted certiorari 361 U.S. 958, 80 S. Ct. 589, 4 L. Ed. 2d 541."

The many opinions we have examined where the jurisdiction of this Court was based on conflict of opinion between the Circuits, the Court have not appeared to investigate or consider whether the alleged conflict was raised below or how it was raised.

We believe there is a reason for that; that an erroneous opinion of a Circuit in conflict with opinion of another Circuit is capable of doing about as much damage to the uniformity of decision in the way of "diversities and conflicts" as one based on the most technically perfect record below.

We therefore submit the issue of the various conflicts of opinion in this Petition are properly before this Court for consideration and ruling on the merits.

The Government's brief states (pp. 2-3) that the jury rejected Petitioners' claim that "Continental's payments constituted a part of the purchase price" and that ended the matter. Under the law as pointed out in our Petition, pages 12 and 13, the sale of a business is to be treated "not as a unit, but as an aggregation of its assets." The Trial

Court erroneously treated this sale of Petitioners' business as a unit and gave the jury no opportunity to fragment it, thereby conflicting with numerous decisions of other Circuits, some of which are mentioned on pages 12 to 16 and 27 to 28 of the Petition herein.

In the footnote on page 3 the Government takes the position that allocation would have been appropriate "if the evidence showed the covenant had distinct value."

There was no dispute in the record as to the covenant having "distinct value", but on the contrary the undisputed evidence shows it had great value.

Mr. Mel Smith, the then vice president of the Continental Casualty Company testified (Tr. 878):

"'ANSWER: The purchase price was to be $50,000.

'QUESTION: What other considerations were there to induce the sale?

'ANSWER: Well, I warned Fisher early in his negotiation that we had to protect the company's business because I didn't trust Mrs. Rubel, so I warned him to get an agreement which would prevent her from switching that business.'"

(Tr. 880:)

"'QUESTION: That consultation agreement was executed by Continental to preserve the business that was being written by her agency to retain her loyalty and to also provide for her future services if needed, is that not correct?

'ANSWER: Yes.'"

(Tr. 626;)

"'QUESTION: And what services did you expect to receive out of Mrs. Rubel?

'ANSWER: Well, I wasn't so concerned about the services as I was—I was not concerned on the

positive side, I was concerned on the negative side. I was concerned what she would do to destroy the business rather than what she would do to preserve it.'"

(Tr. 627:)

"'QUESTION: What were you concerned about with respect to Continental?

'ANSWER: Well, the nature of this business is such that the person who creates it has control over it, so that if that person desires to place it with another company, it's not a difficult job for them to accomplish it.

'QUESTION: You have testified earlier, I believe, that this was a profitable book of business so far as Continental was concerned?

'ANSWER: Yes, it was.

'QUESTION: And when you said you were concerned about Continental you wanted to make sure that book of business stayed with Continental?

'ANSWER: That is true.'"

Such testimony also shows the good will of this business also had great value and the trial court erred in refusing to permit the jury to fragment the purchase price and fix the value of the good will.

The trial court and Court of Appeals erred as a matter of law in holding the five per cent agreement with Continental Casualty Company was an independent contract and not part of a single business transaction made up of several instruments all tied together and all part of the one transaction.

Please note the dates of the several instruments:

Exhibit A—August 19, 1953.

Exhibit B—August 20, 1953.

Exhibit C—August 29, 1953.

Exhibit D—August 31, 1953.

Exhibit E (the 5% agreement)—September 1, 1953.

Exhibit F (Agreement between the seller and buyer dated September 1, 1953) stating as follows: Exhibit F, Appendix G (pages A43 and A45):

"WHEREAS, First Party has sold all of her interest in the Ruth J. Rubel Agency, Inc., an insurance agency, to Second Party, and

WHEREAS, Second Party recognizes that First Party would not have sold said insurance agency to Second Party had not Continental Casualty Company of Chicago, Illinois, simultaneously entered into an agreement with First Party to pay First Party, or the personal representatives of her estate, for consultation services to be rendered by First Party, a sum equal to 5% of the premiums of all insurance written through Continental by Forrest T. Jones or Ruth J. Rubel Agency, Inc., for a period of ten years, and

* * *

"4. A true copy of the agreement between First Party and Continental Casualty Company is attached hereto and by this reference is incorporated herein."

We submit the recurring importance of the problem in the administration of the tax laws relating to the many thousands of sales of businesses calls for review by this Court and its authoritative adjudication.

We therefore pray, in accordance with our petition, that a writ of certiorari issue under the seal of this court, directed to the United States Court of Appeals for the Tenth Circuit to the end that this cause may be reversed.

WALTER A. RAYMOND and
KENNETH C. WEST,
Counsel for Petitioners.